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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1176

JOHN W. BRUBAKER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CLARA BRUBAKER, AND RONALD K. SIEVERT, AN INDIVIDUAL,

Petitioners,

vs.

BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE, JAMES R. ALBERT, WALTER PAGELS, PAUL C. JONES, JR., KENNETH WILKINSON, JOHN CONDON, BEN DUNKLEY, WILLIAM H. FULLRIEDE, JOHN R. HOLLAND AND JACQUELINE MILLER, EACH INDIVIDUALLY AND AS MEMBERS OR AGENTS OF THE BOARD OF EDUCATION, SCHOOL DISTRICT NO. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MITCHELL J. OVERGAARD,
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The decision which the petitioners ask the Court to review is the affirmance of a judgment order of the District Court of the Northern District of Illinois by an equally divided vote of the Court of Appeals for the Seventh Circuit. In its Rule 19 (U. S. Sup. Ct. Rule 19) this Court has stated considerations governing review on certiorari and in paragraph 1(b) has enumerated

reasons to be considered on an application arising from a decision of a court of appeals. When the implications of a divided vote are analyzed it is readily apparent that the decision to be considered here does not fall within any of the reasons contained in the rule and that the granting of the petition is not justified.

The principal contentions made by the petitioners are that the Court of Appeals by its decision established a rule of law abolishing the First Amendment right of academic freedom (Petn. 5), ignored the dictates of the decisions of this Court (Petn. 6) and established as a rule of law a standard which combines a variety of elements which together have a devastating impact upon the right of academic freedom (Petn. 7).

In actual fact and law the decision of the Court of Appeals does nothing to establish any rules of law since the judgment is without force as a precedent. The opinions of the Court to this effect go back to *Etting* v. *The Bank of the United States,* 11 Wheat. 59 (1826) and *Durant* v. *Essex Company,* 7 Wall. 107 (1868). Justice Powell quoted from these decisions as recently as 1972 in *Neil* v. *Biggers,* 409 U. S. 188 (1972) and added (p. 192), "Nor is an affirmance by an equally divided Court entitled to precedential weight," citing to the same effect *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 264 (1960).

Perhaps the best statement of the rule as it bears on the case at bar is found in *Hertz* v. *Woodman,* 218 U. S. 205, 213 (1909):

> Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.

From the foregoing it can be seen that, contrary to the contentions of petitioners, the decision of the Court of Appeals here establishes no rules of law nor can it be considered to be ignoring the dictates of the decisions of this Court. Aside from the fact that the final decision of the Court of Appeals is without precedent and its earlier decision is *functus officio* (Petn. A. 56) the underlying opinion of the District Court was not even reported (Petn. 2), with the result that whatever precedential value it might have and whatever errors of law it might contain are not even conveniently accessible to legal researchers.

It would also seem to follow that inasmuch as the decision of the Court of Appeals here is of no authority or precedent for the determination of other cases, it is not, in the context of Rule 19, a decision in conflict with the decision of another court of appeals; it has not decided an important question of federal law which should be settled by the Supreme Court; it has not decided a federal question in conflict with decisions of this Court and has not departed from the accepted and usual course of judicial proceedings, let alone decided an important state or territorial question.

On the basis of all of the foregoing the Respondents urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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